

NTSB Order No. EA-4292

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 18th day of November, 1994

Respondent .

Docket SE-13327

The Administrator has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on March 23, 1994, at the conclusion of an evidentiary hearing.¹ By that decision the law judge affirmed, in part, a September 23, 1993 order of the Administrator suspending respondent's commercial pilot certificate (No.

6488

130626607) for 90 days on charges that, while making a visual approach for a landing at the Galveston, Texas airport, he had flown too near to another aircraft that was making an instrument approach. The law judge concluded that respondent's operation was careless, in violation of section 91.13(a) of the Federal Aviation Regulations ("FAR," 14 CFR § 91.13(a)), but not violative of the prohibition in FAR section 91.111(a) against flying so close to another aircraft as to create a collision hazard.² The law judge reduced the suspension sought by the Administrator to one of 30 days. The Administrator on appeal argues that the law judge should have sustained the FAR section 91.111(a) charge.³ We agree.

The law judge credited the testimony of the two pilots who estimated that respondent's aircraft, a Beech Model E55, had come within 50 to 100 feet horizontally and within 100 feet vertically

²FAR sections 91.13(a) and 91.111(a) provide as follows:

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 91.111 Operating near other aircraft.

(a) No person may operate an aircraft so close to another aircraft as to create a collision hazard.

³The respondent has filed, within the time frame allowed for submitting a reply brief, a document, styled an appeal brief, which seeks, in effect, a dismissal of the one violation the law judge upheld. However, since the respondent did not file a notice of appeal from the law judge's decision, he cannot now challenge it before the Board.

of the Grumman AA-5 aircraft in which they were executing a practice Instrument Landing System (ILS) approach. His rejection of the charge that respondent had thereby created a collision hazard, with respect to traffic whose position had been reported to him by Air Traffic Control (ATC), rests on the fact that the respondent did not see the slower moving Grumman before he overtook and passed over and slightly to the left of it. At the same time, the law judge concluded that because the respondent *could have been charged* with a failure to comply with his obligation to see and avoid other aircraft, a finding of a violation of FAR section 91.13(a) was justified.⁴

We intimate no view as to what other charges the evidence in this case might have supported. It is enough to observe that Board precedent unequivocally establishes that a pilot need not be aware that he has flown impermissibly close to another aircraft in order to be found to have violated FAR section 91.111(a). See, e.g., Administrator v. Blanc, NTSB Order EA-4112 (1994) at p. 14, citing, among other cases, Administrator v. Richey, 2 NTSB 734 (1974). In view of this precedent, and the uncontradicted testimony of an FAA inspector who testified at the hearing that a collision hazard would be created by flying as close as respondent's aircraft was found to have been to the Grumman, the Administrator's appeal must be granted and the dismissal of the FAR section 91.111(a) charge reversed.

⁴FAR section 91.113(b), not charged here, sets forth a pilot's obligation to see and avoid other aircraft.

Although the Administrator in his appeal urges only that an appropriate sanction be assessed in the event we agree that a violation of FAR section 91.111(a) should have been found, we are persuaded that the 90-day sanction sought in his order is appropriate in the circumstances.⁵ Respondent, instead of exercising the heightened vigilance operations in the vicinity of an airport demand, almost collided with an aircraft he had been advised to look out for and which he knew, or should have known, from the position report and other information about that aircraft he had received, had to be either somewhere between him and the airport or not far from his intended course of flight. We think respondent's decision to continue his approach without first ensuring that the safety of traffic ahead of him would not be compromised was questionable at best, and it justifies, we think, more than a minimal sanction for an FAR section 91.111(a) violation. Since the recommended range of sanction for such

⁵It is possible that the law judge misconstrued the Administrator's order of suspension, which served as the complaint here, to be alleging that respondent's conduct was deliberate. At least that would explain his apparent, though mistaken, belief that there was some doubt as to whether the respondent had in fact seen the Grumman before the near pass. For example, he states "I am convinced that he never saw the other aircraft" (I.D. at 80). However, inasmuch as the complaint explicitly alleged that the respondent "did not see [the Grumman] during the final leg of" their respective approaches, there was no issue concerning respondent's intent for the law judge to resolve. The law judge's confusion in this regard may have been fueled by the complaint's somewhat conflicting allegations that respondent did not see the Grumman even though he had earlier indicated to ATC that he had that traffic in sight. During the hearing the respondent testified that when he told ATC he was looking "at" the traffic he meant that he was looking "for" the traffic. The law judge accepted this explanation.

violations is a suspension from 60 to 180 days, a suspension of 90 days is clearly consistent with FAA guidelines. See FAA Order 2150.3A, Appendix 4, "Enforcement Sanction Guidance Table," p. 19.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The initial decision is reversed to the extent it dismissed the FAR section 91.111(a) charge;
3. The Administrator's order of suspension is affirmed; and
4. The 90-day suspension of respondent's airman certificate shall commence 30 days after service of this opinion and order.⁶

VOGT, Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

⁶For purposes of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the Administrator, FAR section 61.19(f).